



FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

AUG 11 2005

Mr. James P. Palermo
President
Mellon Trust of New England, N.A.
One Boston Place
Boston, MA 02108-1512

RE: MUR 5421
Mellon Trust of New England, N.A.

Dear Mr. Palermo:

On June 23, 2005, the Federal Election Commission found that there is reason to believe Mellon Trust of New England, N.A., violated 2 U.S.C. § 441b, a provision of the Federal Election Campaign Act of 1971, as amended ("the Act"). This finding was based on information ascertained by the Commission in the normal course of carrying out its supervisory responsibilities. *See* 2 U.S.C. § 437g(a)(2). The Factual and Legal Analysis, which more fully explains the Commission's finding, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of your receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

Please note that you have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. *See* 18 U.S.C. § 1519.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. *See* 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be

26044131456

MUR 5421
Mr. James P. Palermo
Mellon Trust of New England, N.A.
Page 2

demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

If you intend to be represented by counsel in this matter, please advise the Commission by completing the enclosed form stating the name, address, and telephone number of such counsel, and authorizing such counsel to receive any notifications and other communications from the Commission.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

For your information, we have enclosed a brief description of the Commission's procedures for handling possible violations of the Act. If you have any questions, please contact Dawn M. Odrowski, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Scott E. Thomas
Chairman

Enclosures
Factual and Legal Analysis
Procedures
Designation of Counsel Form

26044131457

1 **FEDERAL ELECTION COMMISSION**
2 **FACTUAL AND LEGAL ANALYSIS**
3
4

5 **RESPONDENT:** Mellon Trust of New England, N.A. **MUR:** 5421
6
7

8 **I. INTRODUCTION**

9 This matter was generated based on information ascertained by the Commission in the
10 normal course of carrying out its supervisory responsibilities under the Federal Election
11 Campaign Act of 1971, as amended. It concerns bank loans obtained by 2004 Democratic
12 presidential candidate Senator John Kerry in December 2003, most of the proceeds of which he
13 in turn loaned to his presidential primary committee, John Kerry for President, Inc. ("the
14 Committee").

15 As discussed below, the available information raises a question as to whether Mellon
16 Trust of New England, N.A. ("Mellon Trust") made the \$6.4 million loan to Senator Kerry in the
17 ordinary course of business, triggering a possible violation of 2 U.S.C. § 441b by Mellon Trust.

18 **II. FACTUAL AND LEGAL ANALYSIS**

19 **A. Factual Background**

20 On December 18, 2003, Senator John Kerry announced that he was loaning \$850,000 to
21 his presidential primary campaign and was seeking a mortgage on his personal residence to
22 obtain additional campaign funds. Thomas B. Edsall, *Kerry Mortgages Home to Keep*
23 *Campaign Afloat; Fundraising Falling Short for Presidential Hopeful as Primaries Demand*
24 *Increased Spending*, The Washington Post, December 19, 2003, available at 2003 WL
25 67894691. At the time, Senator Kerry was facing strong opposition in the first two Democratic
26 primaries -- the January 19, 2004 Iowa caucuses and the January 27, 2004 New Hampshire

26044131458

1 primary -- and was reportedly running low on funds to meet the increased staff, travel, and
2 advertising demands leading up to them. *Id.*; Sharon Theimer, *Kerry Taps His Own Fortune*,
3 The Deseret News, December 19, 2003 at A10, *available at* LEXIS, News & Business Database;
4 and Patrick Healy, *Kerry Mortgage to Help Fund Race*, The Boston Globe, December 19, 2003
5 at A1, *available at* 2003 WL 66483547.

6 The Committee's disclosure reports reflect that Senator Kerry in fact loaned his campaign
7 \$1.1 million in the form of proceeds from a series of three "smaller" loans between December 12
8 and December 19, 2003 as he was seeking a larger mortgage loan on his personal residence.

9 According to the Schedule C-1s contained in the Committee's January 2003 Year End Report, as
10 amended, the loans comprising the \$1.1 million derived from lines of credit at two banks, Mellon
11 Bank, N.A and Citizen's Bank. The Mellon Bank loans, \$500,000 received on December 12,
12 2003 and \$250,000 received on December 19, 2003, were reported as draws from an unsecured
13 credit line. The third loan, \$350,000 received on December 15, 2003, was reported as a draw on
14 a home equity line of credit from Citizen's Bank that was secured by the Senator's residence, a
15 town home located in the Beacon Hill area of Boston. The property owners of record for the
16 residence are Linda K. Smith and Mellon Bank, N.A., Trustees of the T & J Louisburg Square
17 Nominee Trust. According to information obtained by the Commission, Senator Kerry and Mrs.
18 Heinz Kerry are the beneficiaries of the trust as tenants by the entireties.

19 Senator Kerry soon obtained the fourth and larger loan he was seeking from Mellon Trust
20 Mellon Trust, a \$6.4 million loan secured by another mortgage on the Boston town home
21 residence (alternatively referred to as "the collateral property") on December 19, 2003, and on or
22 about December 23, 2003, he officially announced that he borrowed those funds to lend to his
23 campaign. Thomas B. Edsall, *Kerry Lends Campaign \$6.4 Million; House Mortgaged as Funds*

26044131459

1 *Dwindle*, The Washington Post, A Section, December 24, 2003, *available at* 2003 WL
2 67895772. According to the Committee's disclosure reports, Senator Kerry used the proceeds of
3 the \$6.4 million loan to pay off the previous three credit-line draws, apparently including costs or
4 interest on one or more of the loans, and loaned the Committee \$1,787,965.80 on December 24,
5 2003.¹ On January 5, 2004, he loaned the Committee an additional \$3.4 million from the
6 proceeds of the mortgage loan. Finally, on January 14, 2004, he loaned the Committee
7 \$100,000, the source of which was reported as the Senator's personal funds. All told, as of
8 January 14, 2004, Senator Kerry had loaned his Committee a total of \$6,387,985.80, \$6,287,965
9 of which he obtained through a bank loan and credit line draws.

10 The Commission does not have a copy of the loan note and any related loan documents,
11 but the publicly available Mortgage and the Adjustable Rate Rider appended to it show that the
12 \$6.4 million loan provided for a 3.125% variable interest rate, periodic payments and a due date
13 of January 1, 2034. News reports also indicated that the loan provided for interest-only
14 payments for the first ten years of the loan, a fact that appears to be supported by the
15

¹ The Committee's Schedule C-1s show the \$6.4 million loan as two separate loans received on two separate dates. In the 2003 Year End Report, as amended Schedule C-1 shows a loan from Mellon Trust in the amount of \$2,904,870.35 received on December 24, 2003. Schedule A shows that Senator Kerry loaned the Committee \$1,787,985.80 on that date, and the Schedule C-1s for each of the earlier credit line draws state that these draws were "repaid through proceeds of 12/24/03 loan." Thus, the \$2,904,870 loan amount reported in the Schedule C-1 appears to consist of the \$1,787,985.80 loaned to the Committee and the repayment of the outstanding \$1,100,000 in credit line draws, leaving \$16,884.55 unaccounted for. That amount may be loan costs or the interest owed on the credit line draws. Schedule C-1 contained in the 2004 February Report shows a \$3.4 million loan from Mellon Trust dated January 5, 2004. In contrast to the reporting, the mortgage document references a promissory note, dated December 19, 2004, in the amount of \$6.4 million.

26044131460

1 Committee's monthly payments of \$16,666.67 to "Mellon Private Mortgage" beginning in
2 February 2004 for "loan interest" and by language in the Rider.²

3 On July 21, 2004, the Committee repaid the loans Senator Kerry had made to it, including
4 interest and costs.

5 Because he declined to accept public financing, Senator Kerry was permitted to use
6 unlimited personal funds for his presidential primary campaign, including funds derived from
7 assets owned jointly with his spouse. *See* 11 C.F.R. § 110.10 and 2 U.S.C. § 431(26). He was
8 also permitted to obtain a bank loan secured by property jointly-owned with Mrs. Heinz Kerry
9 without a contribution resulting from her so long as his share of the property is equal to or
10 exceeds the amount of the loan that is used for the campaign. *See* 11 C.F.R. § 100.52(b)(4). *See*
11 *also* 11 C.F.R. § 100.33(a) and (c). As the candidate's spouse, Mrs. Heinz Kerry was subject to
12 the same \$2,000 contribution limit in connection with the primary election as any other
13 individual and reached that limit when she made a \$2,000 contribution on December 31, 2003.

14 The Commission has obtained a copy of an Appraisal Report prepared for Mellon Trust
15 by a certified appraiser with the intention that it be used "only for collateral analysis and/or
16 portfolio management." The appraisal estimated the market value of the collateral property as
17 \$12.8 million as of November 14, 2003, the date the property was inspected by the appraiser.

² The Washington Post article that reported the interest-only terms of the \$6.4 million loan stated that the Mortgage Bankers Association had calculated the monthly interest payments at a 3.125% rate to be \$16,667, precisely what the Committee began reporting as payments for loan interest in February 2004. *See* Thomas B. Edsall, *Kerry Lends Campaign \$6.4 Million; House Mortgaged as Funds Dwindle*, The Washington Post, December 24, 2003 at LEXIS, News & Business Database. A provision of the Rider governing how and when the adjustable interest rate would be calculated appears to refer to interest-only payments. It states in pertinent part: "During the first 120 months of this loan, the Note Holder will determine the amount of my new monthly payment that will be sufficient to pay the monthly interest charges on my loan at my new interest rate. Beginning . . . on January 1, 2014, the Note Holder will determine the amount of the monthly payment that would be sufficient to repay the unpaid principal in full on the Maturity Date at my new interest rate in substantially equal payments."

26044131461

1 In light of the \$12.8 million appraised value of the residence, up to 50% of the value of the
2 property, \$6.4 million, was available for Senator Kerry to use as collateral for a campaign loan
3 based on the representation that he and Mrs. Heinz Kerry are joint beneficial owners of the
4 property as tenants by the entirety. *See* 11 C.F.R. § 100.33(c) (personal funds of a candidate
5 include one-half the value of property jointly-owned with a spouse unless the instrument of
6 conveyance reflects otherwise). *See also* Advisory Opinion 1991-10 (permitting a candidate
7 who held property in Massachusetts as tenants by the entirety to consider one half of the equity
8 in the property as his personal funds).

9 **B. Possible Prohibited Contribution**

10 The Committee's reports and publicly available property records raise an issue as to
11 whether Mellon Trust N.A., a national bank, made the \$6.4 million bank loan to Kerry within the
12 ordinary course of business. If not, Mellon Trust may have violated 2 U.S.C. § 441b since
13 national banks are prohibited from making contributions in connection with election to any
14 political office. *See* 2 U.S.C. § 441b.

15 The Act exempts from the definition of contribution, bank loans made in accordance with
16 applicable law and in the ordinary course of business. 2 U.S.C. § 431(8)(B)(vii). A loan is
17 deemed to be made in the ordinary course of business when it meets the following conditions:

18 1) it bears the usual and customary interest rate of the lending institution for the category of the
19 loan involved; 2) it is made on a basis that assures repayment; 3) it is evidenced by a written
20 instrument; and 4) it is subject to a due date or amortization schedule. 11 C.F.R. § 100.82(a).

21 Issues of particular concern are whether the loan was made on a basis that assures
22 repayment and whether it bears the usual and customary interest rate. Commission regulations
23 provide that a loan is made on a basis that assures repayment if the lending institution making the

26044131462

1 loan has a perfected security interest in collateral owned by the candidate receiving the loan, the
2 fair market value of the collateral is equal to or greater than the loan amount and any senior liens
3 as determined on the date of the loan, and the candidate provides documentation of the perfected
4 security interest. 11 C.F.R. § 100.82(e)(1)(i).

5 Although Senator Kerry's interest in the property on its face is equal to the loan amount,
6 a review of publicly available mortgage records raises the possibility that there may have been a
7 senior lien on the property on the date of the Mellon Trust loan. The appraisal transmittal letter
8 calls special attention to the "Additional Assumptions and Limiting Conditions" which reads, "I
9 have not considered the effect upon value of any mortgage on the subject property." On-line
10 searches of the Suffolk County Registry of Deeds database reflected two other senior liens on the
11 residence that had not been discharged as of the appraisal valuation date. The first lien was an
12 October 1996 mortgage in favor of Citizen's Bank. A discharge of that \$820,000 mortgage was
13 filed on December 23, 2003 although it is dated December 12, 2003. The second lien is an
14 August 23, 1999 open-end mortgage in favor of Citizen's Bank that secures a \$450,000 home
15 equity credit line issued to Senator Kerry. This mortgage appears to have secured the \$350,000
16 credit line draw reported as one of the earlier December loans Senator Kerry made to his
17 Committee. *See supra*, pp. 2-3. A recent search of the Suffolk County database revealed a
18 discharge of the open-ended mortgage dated January 13, 2004 that was not filed until April 20,
19 2005.

20 Whether the value of the collateral property was sufficient depends on whether the
21 collateral was the entire residence or only Senator Kerry's share of the property. Assuming that
22 the collateral for the loan is the entire residence, the \$12.8 million fair market value of the
23 residence as estimated by the appraisal greatly exceeds the amount of Mellon Trust's loan, even

26044131463

1 in light of a possible senior lien arising from the \$450,000 Citizen's Bank home equity credit
2 line. However, the value of the collateral securing the Mellon Trust loan is reported on Schedule
3 C-1 of the Committee's disclosure reports as \$6.4 million raising the possibility that the
4 collateral securing the loan may be limited to Senator Kerry's interest in the property. If the
5 bank's collateral was somehow limited in the underlying loan documents, then the fair market
6 value of the bank's collateral may have been less than the amount of the loan and the senior lien.

7 A second concern is that available information does not permit us to determine
8 conclusively that the \$6.4 million loan bore Mellon Trust's usual and customary rate of interest
9 for this type of loan. The 3.125% variable interest rate coupled with the apparent 10-year
10 interest-only payment requirement appears to be favorable when compared to the interest rates
11 on the earlier December loans Senator Kerry made to the Committee that originated from draws
12 on lines of credit at Mellon Bank and Citizen's Bank. The \$500,000 and \$250,000 draws on the
13 Mellon Bank credit line bore a 5.5% variable interest rate and the \$350,000 draw on the Citizen's
14 Bank credit line bore a 3.5% variable interest rate. The interest rate and interest-only terms may
15 well be usual and customary for the level and type of loan made by Mellon Trust to Senator
16 Kerry. Given the other information needed concerning the Mellon Trust loan as discussed
17 above, the Commission will seek information about whether the interest rate and terms were
18 customary for this type of loan.

19 Based on the foregoing, there is reason to believe that Mellon Trust of New England,
20 N.A., may have violated 2 U.S.C. § 441b by making a loan to a federal candidate outside the
21 ordinary course of business.

26044131464